In the

Court of Appeals

of the

United States

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of MAURICE DUNCAN,
Appellant,

v.

JOHN R. CRANOR, as Superintendent of the Washington State Penitentiary,
Appellee.

No. 12466

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Appellant originally filed a petition for a writ of habeas corpus with the Supreme Court of the State of Washington alleging the same grounds as were alleged in the District Court. In accordance with the procedure of the State of Washington regarding habeas corpus matters, the case was submitted to the Supreme Court for its consideration upon the basis of the pleadings, affidavits and written briefs submitted by each party. The application was denied by the Supreme Court of the State

in an order dated August 17, 1949 (Tr. 15). There is no showing that appellant sought a writ of certiorari from the Supreme Court of the United States to review that denial by the court. Appellant thereupon petitioned the district court for a writ of habeas corpus (Tr. 3-12), appellee answered (Tr. 17-19) and following a hearing upon the show cause order the court announced it would take the case under advisement (Tr. 34). Thereafter, the court announced in a letter to the parties that the petition would be denied and an order was entered on December 30, 1949, denying the petition (Tr. 44). A certificate of probable cause was granted (Tr. 45). Appellant contends the district court has jurisdiction to hear this habeas corpus matter on the ground that a question under the Constitution of the United States is involved. Although no reference was made to 28 U. S. C. 2241 (c) (3), it is assumed that that statute is applicable to give the federal court jurisdiction in this matter. Appellee contends the federal courts do not have jurisdiction for the reason that the state remedies available to the appellant have not been exhausted by him as required by 28 U. S. C. 2254 as a condition precedent to federal jurisdiction in habeas corpus matters involving state prisoners. Further discussion of this question will be submitted in the argument in support of the order.

COUNTER STATEMENT OF THE CASE

Appellant was charged by information in the Superior Court for Clallam County with the crime of carnal knowledge of a female child under the age of 18 years, to-wit 17 years. Upon a plea of guilty to the crime charged, judgment was entered February 27, 1939, sentencing him to the state reformatory at Monroe for a

maximum term of twenty years (Tr. 12-13). Subsequently, in accord with the laws of the State of Washington, appellant was transferred from the reformatory to the state penitentiary at Walla Walla. Appellant has three times been granted paroles from confinement and each time said parole has been revoked by order of the Board of Prison Terms and Paroles of the State of Washington. During the existence of the third and last parole appellant was discharged from "further parole supervision" pursuant to an order of said Board of July 16, 1946 (Tr. 37-42). Appellant contends that the "discharge from supervision" was a complete satisfaction of the criminal judgment and sentence and a release from parole. He contends that the order of the Board, dated March 25, 1948, revoking appellant's latest parole (Tr. 37) was an action in excess of its lawful powers, since under the laws in effect at the time of the judgment and sentence, the Board had no authority to detain a convicted person beyond the expiration date of the period of duration of confinement first fixed by the Board pursuant to law. Appellant contends also, that the revocation of parole, if authorized by an amendment to the law in effect at the time of judgment and sentence, imposed a new or additional punitive measure to a crime already consummated, in violation of the *ex post facto* prohibition of Article I, section 10, of the Constitution of the United States.

ARGUMENT

1. The district court had no jurisdiction because appellant had not exhausted his state remedies at the time of petitioning for a writ of habeas corpus in the federal court.

In order that the federal courts have jurisdiction over habeas corpus matters involving prisoners detained pursuant to a judgment of a state court, it is necessary that that prisoner exhaust his remedies prior to seeking redress in the court of the United States. The Revised Judicial Code (28 U. S. C. 2254) provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Honorable John J. Parker, Judge of the Court of Appeals for the Fourth Circuit, has written a valuable analysis of the rationale and intended operation of this section of the Judicial Code in his article entitled "Limiting the Abuse of Habeas Corpus" published in 8 F. R. D. 171, 175. Judge Parker's analysis of the Code is of particular significance, since he participated in the drafting of the revision of the Code. He states that U. S. C. 2254 is largely a codification of the best practice as worked out by court decisions and says:

> "* * * The effect of this last provision [28 U. S. C. 2254] is to eliminate, for all practical pur-

poses, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari.

"It may be argued that once a petitioner has applied for *habeas corpus* to the courts of the state and has been denied relief, he may proceed with his federal remedy without more ado, since further application to the state courts might well be presumed to be futile. The answer to this is that such further application to the state courts is not futile because it lays the foundation upon which application can be made to the Supreme Court of the United States for certiorari. This touches the heart of the question. The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction.

"* * * * * * * * *

"One of the incidents of the state remedy is right to apply to the Supreme Court for certiorari. If a petitioner has failed to make such application after the refusal of the state court to release him, he cannot be said to have exhausted the remedies available to him under state procedure, provided he has the right to apply again to the state courts for relief as a basis for application to the Supreme Court for certiorari. In the absence of the statutory provision contained in section 2254, it was open to the Supreme Court to hold that, after denial of relief by the State courts, petitioner might seek relief either by asking certiorari from the Supreme Court or filing petition for *habeas corpus* in the federal courts. Such a holding now, however, would be in the teeth of the statute, which forbids the granting of

the writ by the federal courts 'unless it appears that applicant has exhausted the remedies available in the courts of the State,' and which goes on to say that he shall not be deemed to have exhausted such remedies if he still has the right under the law of the state 'to raise, by any available procedure, the question presented.'

"The fact that certiorari from the Supreme Court to the state court may be called a federal remedy is not determinative of the question here involved. The crucial matter is that petitioner still has a right to attack in the courts of the state the validity of his conviction and, upon the record made in such attack, to petition the highest court of the land for a review. So long as such right remains, he does not have, and ought not have, the right to ask a review by one of the lower federal courts. Cases may arise, of course, where such review should be allowed, even though state remedies have not been exhausted; but this is taken care of by the 'special circumstances' exception of the statute. I think that nothing more than this was contemplated by the majority in the Mayo case [*Wade v. Mayo,* —— U. S. ——, 68 S. Ct. 1270, —— L. ed. ——]; but the effect of the statute is to give precision and definiteness to the rule and prevent attempts to have the lower federal courts review state court proceedings where there are no special circumstances justifying departure from the ordinary practice."

It is further stated by Judge Parker that one of the important things done by the Revised Judicial Code relating to the law of habeas corpus was that:

"* * * in the case of state prisoners, resort to the lower federal courts is practically eliminated where adequate remedy is provided by state law." 8 F. R. D., 171, 174.

In the State of Washington successive applications for a writ of habeas corpus may be made as is illustrated by the cases of *In re Lucas,* 26 Wn. (2d) 289, 173 P. (2d) 774, and *In re Lucas v. Smith,* 31 Wn. (2d) 50, 195 P. (2d) 131. In this case, then, the applicant should again petition

the state court and thereby lay the foundation for a petition for certiorari to the Supreme Court of the United States. Since appellant has not sought a writ of certiorari from the Supreme Court of the United States to review the denial of habeas corpus by the highest court of the State of Washington, and since the right to apply for certiorari is a part of the available state remedies (*Ex Parte Hawk*, 321 U. S. 114, —— S. Ct. ——, 88 L. ed. 572), it cannot be said that appellant exhausted his state remedies so as to give the District Court jurisdiction over this cause.

Can it be said that there is no adequate state remedy available or that the state's process is ineffective to protect the rights of state prisoners, so as to give the federal courts jurisdiction over habeas corpus matters involving such prisoners under the "special circumstances" exception of 22 U. S. C. 2254? That is largely the question here, since, in hearing the cause, the District Court apparently considered the state remedies ineffective or unavailable.

The scope of inquiry upon habeas corpus in the state courts is defined by section 3, chapter 256, Laws of Washington, 1947 (1075 Rem. Supp. 1947) which provides, so far as is material here, as follows:

> "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:
>
> "(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated."

It is thus apparent that the State of Washington affords a range of inquiry equal to that granted by courts of any other jurisdiction, including the federal courts, although a strong presumption in favor of the record is recognized by the Washington Supreme Court. *In re Higdon*, 30 Wn. (2d) 546, 192 P. (2d) 744.

Under the State Constitution and statute, the Supreme Court of Washington and the Walla Walla County Superior Court have concurrent jurisdiction over habeas corpus matters involving prisoners of the state penitentiary at Walla Walla. Article 4, § 4 and Article 4, § 6, Washington Constitution; Rem. Rev. Stat., §§ 1 and 15. In practice, most applications for habeas corpus by inmates of the state penitentiary are made to the State Supreme Court. The practice therein is as follows: When a petition for a writ of habeas corpus is filed in the State Supreme Court an order is normally issued requiring the superintendent of the state penitentiary to show cause why the writ should not issue. A date is set for hearing upon that order, and at that time either party may present oral argument. In practice, oral argument is rarely presented unless the petitioner is represented by counsel, since prisoners are not normally brought from Walla Walla to Olympia to personally argue their cases. However, either party is permitted to present documentary proof or affidavits and to submit written argument. Where the petitioner alleges facts sufficient to constitute a *prima facie* case for release, and the record before the court does not show such allegations to be false, the court will issue the writ or an order to show cause returnable before a superior court of the state, at which time the petitioner is present and evidence is taken. This procedure has become necessary in the State

of Washington as the result of a flood of habeas corpus petitions flowing from the state penitentiary, of which applications a very small fraction were found to be meritorious. It will be observed that the state procedure is very similar to that followed in the federal courts. The only difference between the procedure in the federal and state courts lies in the fact that the District Court permits the actual presence of the petitioner at the hearing upon the show cause order, whereas the Washington Supreme Court does not. The fact that the prisoner is only rarely transported to the scene of the hearing upon the show cause order is immaterial however, since the sufficiency of a petition for a writ of habeas corpus may be inquired into upon an order to show cause, and the petitioner is not entitled as a matter of right to be present at the hearing upon such order. *Ex parte Hull*, 312 U. S. 546, —— S. Ct. ——, —— L. ed. ——; *Fathers v. Smith*, 25 Wn. (2d) 896, 171 P. (2d) 1012. In short, it is submitted that the state procedure is adequate to protect the rights of prisoners held in custody in the state institutions.

The state procedure being adequate, and being available to petitioners making successive applications, the failure of an appellant to apply to the Supreme Court of the United States for a writ of certiorari to review the denial of his habeas corpus petition by the highest court of the State of Washington and his failure to reapply to the state court should bar him from further consideration by a federal district court. Appellant has not exhausted all of the remedies available under the state procedure and the district court had no jurisdiction to hear the matter.

2. The "Discharge from Supervision" did not constitute a discharge from parole or a satisfaction of the criminal judgment.

The Washington law provides that upon conviction of a crime the sentencing court shall impose only the maximum term of imprisonment. Within six months after the admission of such convicted person to the penitentiary or reformatory the State Board of Prison Terms and Paroles has the duty of fixing the duration of confinement for that prisoner. In fixing the duration of confinement, the board is required to make investigations and to consider the recommendations of the sentencing judge and prosecuting attorneys. In addition, the Board is given the power to readjust the duration of confinement of a particular prisoner to a longer period of time for rule infractions, to allow good time credit under certain conditions, and to grant paroles to prisoners who are considered rehabilitated and fit subjects for release from confinement, said parolees to be subject to rules and regulations established by the Board. See chapter 114, Laws of Washington, 1935, as amended by chapter 142, Laws of Washington, 1939, and chapter 92, Laws of Washington, 1947 (Rem. Rev. Stat. Supp., 10249-2, et seq. and section 10249-2, Rem. Supp. 1947). The State Board of Prison Terms and Paroles has no power to terminate a judgment of a court of the State of Washington. It is an administrative body with only the power to determine whether a convict must serve his judgment and sentence *in confinement* or *out of confinement on parole.* It has no further power. There is no power to set aside a judgment short of the expiration of the entire maximum term provided by the court's judgment. The only such power to terminate a judgment is the pardon power which is vested exclusively in the governor.

The order discharging appellant from supervision was made while he was on parole in order to allow him to serve in the Merchant Marine (Tr. 25). This order (Tr. 38) was made pursuant to the rules and regulations which the Board is permitted to establish by section 4, chapter 114, Laws of 1935 as amended by section 1, chapter 142, Laws of 1939 (Rem. Rev. Stat. Supp. 10249-4):

> "The Board of Prison Terms and Paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled at its discretion."

Though appellant was released from parole *supervision*, he was not discharged from *parole*. It will be noted that the order discharging appellant from parole supervision specifically denied the restoration of his civil rights (Tr. 38). Even had the Board attempted to grant a complete satisfaction of the judgment, such a grant would have been outside of its authority and thus void. Therefore, appellant is still subject to service in confinement of the maximum term under the judgment here involved. Inasmuch as that judgment and sentence have not been satisfied, appellant states no grounds upon which to base his writ.

3. There has been no violation of the ex post facto provisions of the Constitution of the United States.

It is appellant's contention that the Board of Prison Terms and Paroles of the State of Washington acted in excess of its authority in revoking appellant's parole by an order dated March 25, 1948 (Tr. 37) inasmuch as the Board had no power to confine a convicted person beyond the duration of confinement first fixed by the Board, ac-

cording to the laws in effect at the time of appellant's judgment and sentence. Appellant was sentenced under Chapter 114, Laws of Washington, 1935, which provides in part as follows:

> "Sec. 2. * * * the court shall sentence such person to the penitentiary * * * and shall fix the maximum term of such person's sentence only * * * "
>
> " * * * * * * * * * * *
>
> "Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court, where the law does not provide for a maximum term."

Chapter 114 provides further:

> "The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and diligence in work as provided for by this board: *Provided*, That in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.
>
> "The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion."

From the above cited provisions of Chapter 114, Laws of Washington, 1935, it is clear that the court sets a maximum sentence while the Board of Prison Terms

and Paroles fixes a duration of confinement period which must be served, less time credits for good behavior, before a convicted person may be released on parole. Appellant has confused the maximum term set by the court with the duration of confinement period. The only procedure by which a convicted person may be released from confinement is by parole, and he is only eligible for parole, under Washington law, after he has served his confinement period fixed by the Board, less time credits. Inasmuch as the statute empowers the Board to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary, and to return such person to the confines of the penitentiary at its discretion, the parolee must be understood to have accepted the privilege of parole with whatever conditions are annexed, no matter how difficult or burdensome. Therefore, the Board was acting within its powers in revoking appellant's latest parole.

Appellant's final contention is that the above mentioned revocation of parole, although authorized under an amendment to Chapter 114, Laws of Washington, 1935, imposes an additional punitive measure to a crime already consummated in violation of the ex post facto prohibition of the federal constitution.

The amendment complained of was enacted in Chapter 142, section 1, Laws of Washington, 1939 (Rem. Rev. Stat. Supp, 10249-4), by the addition of the following language to Chapter 114, section 4, Laws of 1935:

> "Provided further, that no prisoners shall be released from the penitentiary or the reformatory unless, in the opinion of the Board of Prison Terms and Paroles his rehabilitation has been complete and he is a fit subject for release, or until his maximum term expires."

"*Ex post facto* laws" have been defined in 11 Am. Jur. 1176, Constitutional Law § 348 as follows:

> "The Supreme Court of the United States at different times has enunciated somewhat variant definitions of the phrase 'ex post facto laws.' The early and classic definition is as follows: '(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.' An ex post facto law has also been defined as a law which punishes that which was innocent when done, which adds to the punishment of that which was criminal, which increases the malignity of a crime, or which narrows the rules of evidence, so as to make conviction more easy. Again it is said that a law, to be ex post facto, must be one that deprives the person accused of crime of a substantial right in which he was protected and granted immunity by the law in force at the time of the commission of the offense."

The only classification material to this inquiry in the above definition is that which defines an *ex post facto* law as one which increases the punishment which the law imposed on the crime when committed and which deprives the accused of a substantial right.

Appellee submits initially that there has been no substantive change in the law by virtue of the 1939 amendment. Under the law, as originally enacted, the Board of Prison Terms and Paroles was authorized to establish conditions of parole and was authorized to return a convicted person to confinement at its discretion. It had no power to terminate the sentence imposed by

the court, nor was it given that power by the 1939 amendment. As a practical matter, the Board might have made the conditions of parole so light as to maintain merely nominal control over the parolee. Nevertheless, by law the Board could never, under the Act of 1935, completely discharge the parolee until his maximum sentence had expired or he was pardoned by the Governor. The 1939 Amendment simply states what was part of the existing law by necessary implication. It merely sets forth a standard to guide the Board in determining the fitness of an applicant for parole. Briefly, appellee submits that there has been no change in the law sufficient to violate the *ex post facto* prohibition of Article I, section 10 of the Federal Constitution.

Assuming for this argument, that the 1939 amendment effected a substantive change in the law relating to parole, appellant has still not stated any grounds for the invocation of Article I, section 10. Parole has long been considered by the courts of the State of Washington to be a privilege and not a right. See *In re Pierce v. Smith*, 31 Wn. (2d) 52, 195 P. (2d) 112; *In re Grieve v. Smith*, 26 Wn. (2d) 156, 173 P. (2d) 168; *Fathers v. Smith*, 25 Wn. (2d) 896, 171 P. (2d) 1012; *State ex rel. Linden v. Bunge*, 192 Wash. 245, 73 P. (2d) 516. In *Milliken v. McCauley*, 20 F. Supp. 202, the District Court held, in construing the precise statute now under consideration, that parole is a matter within the discretion of the Board of Prison Terms and Paroles.

In *People ex rel. Kurzynski v. Hunt*, 25 F. Supp. 647, the laws of New York State relating to revocation of paroles were altered after petitioner's conviction and confinement. The court said:

> "'* * * When petitioner was accorded this privilege and was released on parole, he took it with conditions thus attached to it by law, including the method then provided for determining parole violations. There was no constitutional guaranty when sentence was imposed upon petitioner that the provisions regarding parole and for determining violations thereof would remain constant. The only constitutional inhibition was that no law would be passed that would increase the punishment for the crime he had committed. *Malloy v. South Carolina*, 237 U. S. 180, 184, 35 S. Ct. 507, 59 L. Ed. 905; *Duncan v. Missouri*, 152 U. S. 377, 382, 14 S. Ct. 570, 38 L. ed. 485."

The United States Supreme Court cases cited by the district court in the above quoted opinion are themselves analogous and, respondent believes, controlling in the present situation. In the *Duncan* case the Court held that a change in the court procedure by the abolition of certain courts existing at the time of the commission of the crime and creation of new ones under which the appellant had been tried was not *ex post facto*. In the *Malloy* case it was held that a change in the punishment for murder from death by hanging to electrocution did not render the statute repugnant to the *ex post facto* clause of the United States Constitution. The rationale is clear: a procedural change with no accompanying substantive charge is not within the *ex post facto* prohibition.

The penalty for the crime for which appellant was convicted and sentenced has at no time material to this case been increased. The punishment was confinement for twenty years. In order to prevail, appellant must show that there has been such a change in the law between the commission of the crime and the sentence therefor as to subject him to an additional penalty. This has not been shown. It is appellee's position, therefore, that even had the laws relating to parole been so amended

as to render the terms and conditions of that privilege more onerous, there has been no deprivation of a *right* within the intendment of the *ex post facto* provision.

CONCLUSION

The order of the district court should be affirmed for the reasons that it is without jurisdiction to issue a writ of habeas corpus in this matter inasmuch as the appellant has failed to exhaust his remedies under the state procedure for the granting of such writ; that he has not been discharged from the judgment under which he is now confined; and that he is not now confined in violation of the *ex post facto* provisions of Article I, section 10, of the Constitution of the United States.

Respectfully submitted,

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